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March 13, 2006

**Ex Parte**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket 04-440**

Dear Ms. Dortch:

I am writing to respond to the "CLEC Opposition to Verizon's Petition for Forbearance from Title II Regulation of Its Broadband Services" that was submitted in the above-referenced proceeding on March 9, 2006.[1] The CLECs claim that various prior decisions require the Commission to deny Verizon's petition, that denial is necessary to enforce certain "social policies" in the Act, and that Verizon has failed to provide sufficient factual evidence to justify the requested relief. Each of these claims is wrong.

1. The CLECs first argue (at 1) that the Commission recently rejected the relief Verizon seeks in the *Wireline Broadband Order*,[2] and that it accordingly "has a duty to follow a consistent analytical approach" here.[3] As we previously explained, however, that order did not reject forbearance for the broadband services at issue here; it did not even address the question whether forbearance was appropriate for such services. *See March 2 Letter* at 1-2.[4] To the extent the *Wireline Broadband Order* discussed the broadband services at issue here at all, it was merely to point out that such services were not being classified as information services in that order

[1] *See* CLEC Opposition to Verizon's Petition for Forbearance from Title II Regulation of Its Broadband Services, WC Docket No. 04-440 (March 8, 2006) ("*CLEC Opposition*"), attached to Ex Parte Letter from Thomas Jones, Wilkie Farr & Gallagher, to Marlene Dortch, FCC, WC Docket No. 04-440 (FCC filed Mar. 9, 2006). This is a slightly expanded version of an ex parte submission that the same CLECs filed on March 3, 2006. *See* Ex Parte Letter from Thomas Jones, Wilkie Farr & Gallagher, to Marlene Dortch, FCC, WC Docket No. 04-440 (FCC filed Mar. 2, 2006).

[2] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*").

[3] EarthLink makes a similar claim. *See* Ex Parte Letter from Donna Lampert, Lampert & O'Connor, to Marlene Dortch, FCC, WC Docket No. 04-440 (FCC filed Mar. 8, 2006).

[4] *See* Ex Parte Letter from Dee May, Verizon, to Marlene Dortch, FCC, WC Docket No. 04-440 (FCC filed Mar. 2, 2006) ("*March 2 Letter*").

because some of these services "do not inextricably intertwine transmission with information-processing capabilities." *Wireline Broadband Order* ¶ 9. But the Commission need not determine that the services at issue are information services in order to remove them from mandatory Title II regulation; the Commission can instead use its forbearance authority. And as we previously demonstrated, because the services at issue here meet each of the same criteria on which the Commission relied in eliminating mandatory common-carriage regulation for the broadband services addressed in the *Wireline Broadband Order*, the use of that authority is fully warranted here as well. *See February 7 Letter* at 4-6; *March 2 Letter* at 2.

The CLECs also cite a number of other decisions where they claim (at 1-2) the Commission found that Verizon "has market power" for the broadband services at issue. But none of these prior decisions is pertinent to the relief requested here.

The CLECs first note that the *Verizon/MCI Order* found that "for many buildings there is little potential for competitive entry." *CLEC Opposition* at 1 (citing *Verizon/MCI Order* ¶ 39). But that finding does not affect the Commission's prior holdings that competing carriers are capable of providing the packet-switched and OCn-level services at issue here nationwide. *See Triennial Review Order* ¶¶ 537-541 (finding no impairment for packet-switched services nationwide); *see also id.* ¶ 202 (finding no impairment for OCn-level services nationwide). As we previously explained, the *Verizon/MCI Order* "focuse[d] on special access competition generally," rather than "on the likelihood of competitive facilities deployment" at any capacity level in particular. *Verizon/MCI Order* ¶ 27 & n.89; *see February 7 Letter* at 14; *March 2 Letter* at 4. As a result, the Commission did not conduct a separate analysis for different capacities of special access services, including the OCn-level services that are at issue here. Nor did the *Verizon/MCI Order* question the Commission's earlier determination that competing carriers can successfully provide packet-switching services, but instead it found that competition for those services "should remain strong." *Verizon/MCI Order* ¶ 56. Thus, the Commission's conclusions about the likelihood of competitive entry at a building as a general matter do not apply to the broadband services at issue here, for which the Commission has found that competitive supply is not only possible but likely. *See February 7 Letter* at 14.

The CLECs next cite (at 2) the Commission's findings in the *Triennial Review Remand Order* regarding the ability of competing carriers to deploy individual DS1 and DS3 loops to business customers. As we have explained, however, the forbearance Verizon seeks here excludes traditional TDM-based special access services including DS1 and DS3 services, which will continue to be available as wholesale common carriage services. *See February 7 Letter* at 2 & Att. 1. In fact, more than 90 percent of Verizon's special access revenues currently subject to price cap regulation (or exempted from price cap regulation pursuant to waivers that the Commission granted for certain advanced services) would continue to be subject to Title II regulation if Verizon's petition is granted. With respect to the services that are affected by this petition, the Commission's prior finding in the Triennial Review proceeding fully support the requested relief. As noted above, the Commission has found that competing carriers are capable of providing packet-switching and OCn-level services nationwide. *See Triennial Review Order* ¶¶ 202, 537-541; *March 2 Letter* at 4.

The 1999 *Special Access Pricing Flexibility Order*[5] also does not support the CLECs. That order reduced regulation of special access services in competitive markets because "the existing rules clearly limit price cap LECs' ability to respond to competition." *Special Access Pricing Flexibility Order* ¶ 92.

[5] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) ("*Special Access Pricing Flexibility Order*").

Although the Commission did not eliminate all forms of Title II regulation, its decision was based on a record that is now more than six years old and that did not differentiate between special access services generally and the subset of broadband services that are at issue here. Moreover, as we demonstrated, competition has increased dramatically since that time for the broadband services at issue, existing regulations hamper Verizon's ability to respond to that competition, and it is therefore appropriate for the Commission to provide additional regulatory relief. *See February 7 Letter* at 3-14. The CLECs do not even attempt to rebut our factual showing.

The CLECs' reliance on the *Omaha Forbearance Order*[6] also is misplaced. Contrary to what the CLECs claim (at 2), the Commission did not make an affirmative finding that Qwest should continue to be treated as dominant despite the presence of a substantial intermodal competitor in the market. Rather, the Commission merely held that Qwest had "not provided sufficient data . . . to allow us to reach a forbearance determination under section 10(a) for the enterprise market." *Omaha Forbearance Order* ¶ 50. Here, by contrast, Verizon has provided extensive data to enable the Commission to make such a finding with respect to the broadband services at issue. And, again, the CLECs have failed to rebut this showing.

The CLECs next cite (at 2-3) two orders – the *PCIA Forbearance Order*[7] and the *SBC IP Platform Forbearance Order*[8] – where the Commission refused to forbear from applying sections 201 and 202 of the Act, and held that a petitioner seeking forbearance from those sections "should be obligated to explain in detail why the Commission should forbear from those sections even though it has never done so before." *SBC IP Platform Forbearance Order* ¶ 17; *see also PCIA Forbearance Order* ¶ 17. As we have previously explained, however, in the time since it issued those decisions, the Commission *has* eliminated the mandatory application of these sections to wireline broadband Internet access services and the underlying broadband transmission services used to provide those services. *See Wireline Broadband Order*; *see also Cable Modem Order* ¶ 95 (recognizing that forbearance would be an appropriate method for removing "each provision of Title II regulation").[9] And as noted above and in our previous filings, the services at issue here meet the same criteria on which the Commission relied to justify the relief in the *Wireline Broadband Order*. *See February 7 Letter* at 4-6. Verizon has accordingly satisfied the obligation to explain why the Commission should grant the same relief here.

Finally, the CLECs argue (at 6-7) that the Commission's previous findings of non-dominance in the *AT&T Non-Dominance Order*[10] and *BOC Classification Order*[11] do not support the relief here. The CLECs claim that the *AT&T Non-Dominance Order* relied on the fact that "AT&T no longer own[ed]

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[6] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, FCC 05-170 (rel. Dec. 2, 2005) ("*Omaha Forbearance Order*").

[7] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 98-100 (FCC rel. July 2, 1998).

[8] *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd 9361 (2005).

[9] *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Order*").

[10] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995) ("*AT&T Non-Dominance Order*").

[11] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756 (1997) ("*BOC Classification Order*").

bottleneck local access facilities," but the Commission raised that point merely to explain why it was departing from divestiture-era precedent and looking solely at the interexchange market rather than an "all services" market, not because the control of local facilities was relevant to whether AT&T was non-dominant in the interexchange market at issue. *See AT&T Non-Dominance Order* ¶¶ 26-32. In any event, as the Commission has already recognized, no such bottleneck facilities exist with respect to the services at issue here. *See Triennial Review Order* ¶¶ 202, 537-541. The CLECs also claim that when the Commission found the BOCs non-dominant in the provision of interexchange service it relied on other safeguards (section 272, UNE loops, and competition from MCI and AT&T) that no longer exist. But in each case, those safeguards were eliminated based on a finding they were no longer necessary to protect competition, and the CLECs fail to provide any evidence to suggest those findings no longer hold true today.

2. The CLECs next argue (at 3-4) that, if the Commission grants Verizon the requested relief, it would "likely lose its ability to advance critical social policy objectives established by Congress," because those objectives apply only to Title II services, not Title I services. As an initial matter, because the services at issue here are provided to large enterprise customers, many of the social policy concerns that have been raised with respect to mass market services do not necessarily apply. And to the extent that any of them do, the Commission already held in the *Wireline Broadband Order* that "the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers." *Wireline Broadband Order* ¶ 109. Thus, in the *Wireline Broadband Order*, the Commission exercised its Title I ancillary jurisdiction "to ensure achievement of important policy goals of section 255 and also section 225 of the Act" – two of the provisions that the CLECs highlight (at 4) as outside the scope of such jurisdiction. Of course, that does not necessarily mean that the Commission should exercise its ancillary authority to impose these requirements, only that the Commission has concluded it has the authority to do so if necessary.

3. Finally, the CLECs take issue (at 5-7) with the extensive factual showing that Verizon provided with respect to the broadband services at issue here, but their claims do not withstand scrutiny.

The CLECs argue (at 5-6) that the Commission should ignore Verizon's evidence that competing carriers have captured significant amounts of the retail business for the packetized broadband services at issue. Although the CLECs do not challenge any aspect of our showing, they claim that competing carriers rely extensively on ILEC facilities to provide those services. As explained above, however, to the extent that CLECs rely on traditional DS1 and DS3 services, those services are not affected by the petition and will continue to be available on the same terms as they are available today. And, as the Commission has recognized, CLECs can and do use those traditional special access inputs to offer some of some of the types of services at issue here, by simply attaching their own electronics.[12] Also, to the extent that CLECs rely on OCn-level services, the Commission has already found that competing carriers can deploy OCn facilities themselves or obtain them from a third party.[13]

[12] *See Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, Memorandum Opinion and Order, WC Docket No. 04-246, FCC 05-171, ¶ 11 (FCC rel. Oct. 14, 2005) (finding that competitive packet switching providers "purchase Verizon's special access facilities as inputs to their own retail advanced services").

[13] The CLECs claim that the Commission's finding that CLECs are not impaired without access to OCn facilities does not mean that ILECs are non-dominant for OCn services, and claim that in the *Omaha Forbearance Order* the Commission granted UNE relief while retaining dominant carrier regulation for business services. As noted above, however, the *Omaha Forbearance Order* did not make an affirmative finding that continued dominant carrier regulation was appropriate, only that Qwest had failed to provide market-specific evidence to prove otherwise. Here, by contrast, Verizon has provided such evidence and the CLECs have not challenged it.

The CLECs' only response (at 5) is that Verizon's "control over wholesale allows it to exercise market power in the downstream market." But, as the Commission has recognized, the market for enterprise customers – the downstream purchasers of the services at issue –is fiercely competitive and Verizon is not the largest player. *See Verizon/MCI Order* ¶¶ 64, 74.

* * *

In sum, the CLECs fail to raise any valid legal or factual arguments for denying Verizon the requested relief. The Commission should accordingly grant Verizon's petition and provide it with flexibility to offer high-speed packetized and optical broadband services on either a private carriage or common carriage basis so that it can better compete for the business of the sophisticated customers who buy these services.

Please let me know if you have any questions.

Sincerely,

cc: B. Childers
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